No. 75-1367

In the Supreme Court of the United States

OCTOBER TERM, 1975

BERNARD SCHIFTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1976. The petition for a writ of certiorari was filed on March 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for petitioner's arrest and for the subsequent seizure of stolen goods from his automobile.

2. Whether the evidence supports the district court's ruling that petitioner was advised of his rights under *Miranda* v. *Arizona* prior to making any post-arrest statements.

3. Whether the district court's instruction to the jury on the voluntariness of petitioner's post-arrest statements complied with 18 U.S.C. 3501.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of unlawfully possessing and transporting a quantity of stolen camera lenses and accessories, in violation of 18 U.S.C. 549 and 659. He was sentenced to concurrent terms of two years' imprisonment on one count and ten years' imprisonment on the other, subject to study and report under 18 U.S.C. 4208(b) and (c). He was also fined $10,000. The court of appeals affirmed (Pet. App.).

1. On August 8, 1974, a shortage of nineteen cartons of imported cameras, lenses and accessories was discovered at John F. Kennedy Airport in Queens, New York. This merchandise was valued at approximately $27,816 (Tr. 133-138, 141-144).

In September 1974, petitioner informed August Zolfo that he had some camera lenses and asked if Zolfo could "handle" them in his store (Tr. 152). Zolfo said that he would first have to see the lenses and have some of his friends look them over. On the next day, petitioner provided Zolfo with one of the lenses for his inspection (Tr. 151-157).

On September 19, 1974, United States Customs agents met with Zolfo and determined through an investigation of a list of the serial numbers of the lenses stolen from Kennedy Airport that the lens provided by petitioner to Zolfo was part of that shipment. After being informed of this, Zolfo cooperated with the authorities and called petitioner in order to arrange a purchase of the remaining lenses. With Thornton listening to the conversation over an extension telephone, Zolfo asked petitioner if "[he] had any

additional lenses at that time" (Tr. 246). Petitioner said he did, and Zolfo then made arrangements with petitioner to have his friend purchase the lenses the next day at petitioner's gas station in Brooklyn (Tr. 38-42, 80-81, 154-160, 245-248).

The next day, Joseph Giordano, a detective with the New York Port Authority Police, who was working in an undercover capacity, met with petitioner in the office of the gas station. Giordano was equipped with a body recorder and transmitting device to enable other agents, who were conducting surveillance, to know when the sale was made. Giordano and petitioner negotiated the sale of twenty-one lenses for $1,000, which Giordano paid petitioner in one hundred dollar bills. They then proceeded to petitioner's station wagon, which was parked nearby, and Giordano observed two boxes in the rear of the car. One box had a visible camera lens in it; petitioner also showed Giordano a box of camera accessories and stated that "[w]e have 400 cameras, too" (Tr. 82-87, 101, 104-106, 161-164). The surveilling agents, having received a prearranged signal indicating that petitioner had been paid the money, then arrested petitioner (*e.g.*, Tr. 4-5, 17-18, 52-54, 82-84, 191-192; November 21, 1975 Tr. 5-7, 17-19, 34-37).[1]

Agent Thornton, who arrested petitioner, testified that when he arrived at the gas station he observed petitioner and Giordano standing together at the rear of petitioner's car, which had two large containers in it (Tr. 5-8, 17-21). After Thornton advised petitioner of his rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 436, petitioner was searched by Customs Agent Thomas Maxwell. The $1,000 given to petitioner by Giordano was found in peti-

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[1] "November 21, 1975 Tr." refers to the re-opened suppression hearing commenced on that date.

tioner's pocket. After being readvised of his rights by Maxwell, petitioner stated that the $1,000 was for "gas money" (*e.g.*, Tr. 10-12, 48, 56-70, 178-179, 251; November 21, 1975 Tr. 30). Subsequently, petitioner was once more advised of his rights by both Thornton and Maxwell, and in response to questions by the agents regarding his possible cooperation in the investigation of the stolen merchandise, petitioner stated that if he cooperated "his bones would be spread all over the airport" (*e.g.*, Tr. 15-16, 241-242, 253).

The boxes in the station wagon at the time of petitioner's arrest contained camera lenses and accessories that were part of the stolen shipment (Tr. 277-279).

2. Prior to the commencement of the trial, petitioner moved to suppress his post-arrest statements on the ground that he was not given *Miranda* warnings and to suppress the seized merchandise on the ground, *inter alia*, that there was no probable cause. After a hearing, the district court denied both motions. It stated (Tr. 122):

> I find that Thornton gave [the] defendant an adequate warning when he first apprehended him; and I find that the other warnings, while they certainly helped, that he had been given an adequate warning were unnecessary in the light of the first warning.
>
> Secondly, * * * what search there was took place as an incident to the arrest immediately following the commission of the crime * * *. [T]he tapes show when coupled together with the testimony of this last witness, they did know a crime had been committed.

Prior to the imposition of sentence, the district court allowed petitioner to re-open the suppression hearing to call additional witnesses (see November 21, 1975 Tr. 1-45). Petitioner's renewed motion to suppress was denied

(December 5, 1975 Tr. 27; see *id.* at 15, 19).[2] Petitioner's contention that the court's instruction regarding his admissions had been inadequate also was rejected (December 5, 1975 Tr. 32).

ARGUMENT

1. Petitioner contends (Pet. 21-24) that the agents had insufficient probable cause either to arrest him or to seize the boxes of stolen merchandise from his car. But the record shows the agents had ample cause to do these things. Thornton knew that petitioner had given a lens to Zolfo that was part of the shipment stolen from Kennedy Airport, had agreed with Zolfo on the previous day to sell additional lenses to Zolfo's friend, and had taken $1,000 from Giordano in payment for the lenses. These facts combined to create circumstances "sufficient to warrant a prudent man in believing that [petitioner] had committed or was committing an offense." *Gerstein* v. *Pugh*, 420 U.S. 103, 111-112, quoting from *Beck* v. *Ohio*, 379 U.S. 89, 91.[3] Since petitioner was arrested by the rear of his station wagon, the seizure of the stolen merchandise was proper as incident to the arrest. *E.g.*, *Chimel* v. *California*, 395 U.S. 752, 763. Beyond this, the officers had been aware that the station wagon contained two large cartons and that one of the boxes contained a lens. This independently provided the agents with cause to seize what they reasonably believed was the contraband. Cf. *Texas* v. *White*, 423 U.S. 67; *Chambers* v. *Maroney*, 399 U.S. 42, 48; *Ker* v. *California*, 374 U.S. 23, 42-43.

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[2]"December 5, 1975 Tr." refers to the re-opened suppression hearing continued on that date.

[3]Petitioner's claim that there was no probable cause is also inconsistent with the position he took during the suppression hearing, at which he argued that a search warrant was required before a search of his car could have been conducted because the agents had probable cause (see Tr. 119, 121).

2. Petitioner contends (Pet. 11-20) that the district court erroneously found that he was advised of his rights under *Miranda*. But the district court, which has the task of weighing the credibility and recollection of witnesses, chose to credit the testimony of four arresting officers who testified that *Miranda* warnings were given prior to petitioner's admissions (Tr. 114, 116-119, 122, 128, 130; December 5, 1975 Tr. 14-22, 26-27). The court's finding must be upheld unless it was clearly erroneous. *E.g., United States* v. *Rosa*, 493 F. 2d 1191, 1193-1194 (C.A. 2), certiorari denied, 419 U.S. 850. There is no need for this Court to review this essentially factual question,[4] which was resolved adversely to petitioner by the court of appeals. See *Graver Mfg. Co.* v. *Linde*, 336 U.S. 271, 275.

3. Petitioner contends (Pet. 6-10) that the district court's instruction to the jury on the voluntariness of his post-arrest statements did not comply with 18 U.S.C. 3501. Petitioner did not request a specific instruction and did not object to the instruction given by the court; hence, review would be warranted only if there was plain error. See Fed. R. Crim. P. 30, 52(b). There was no error in this case.

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[4]Petitioner's contrary claim is premised primarily on the fact that a two-minute tape recording of the arrest, which was made from conversations over Giordano's transmitting device, does not include any *Miranda* warnings. However, the evidence showed that Giordano was separated from petitioner after his arrest and that he did not hear any warnings given to petitioner (*e.g.*, Tr. 89-90, 194-200, 257-259, 291-292; November 21, 1975 Tr. 20-23, 32-33). Thus, the court properly determined that the recording device worn by Giordano and the tape, which had "a lot of inaudibility" and "substantial gaps," and which petitioner himself stated was not "too clear" (Tr. 113, 233-234, 237-238), could not have picked up all the conversations following petitioner's arrest (Tr. 114, 127-129; December 5, 1975 Tr. 14-15, 19-20).

The jury was instructed to disregard entirely petitioner's admissions "unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement[s] * * * [were] 'knowingly' made or done * * *. In determining [this], the jury should consider * * * [among other circumstances] [the] physical and mental condition of [petitioner] while in custody or under interrogation, * * * and also all other circumstances in evidence surrounding the making of the statement * * *, including whether [he was given a proper warning of his rights]" (Tr. 346-347). This instruction more than adequately complied with the requirements of 18 U.S.C. 3501.[5] *United States* v. *Barry*, 518 F. 2d 342 (C.A. 2), relied on by petitioner (Pet. 6-10), is beside the point. *Barry* does not prescribe any specific language that must be included in an instruction under 18 U.S.C. 3501; it merely held that a "standard boilerplate charge on credibility," with no "specific reference to a confession" (518 F. 2d at 347), failed to comply with Section 3501. That holding is not applicable to this case, in which there was a specific instruction regarding petitioner's admissions.

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[5]Indeed, the instruction actually given goes beyond the requirements of 18 U.S.C. 3501(a) in that it required the jury to find voluntariness beyond a reasonable doubt before it considered the post-arrest statements. Under the statute, there is no such requirement. After the court finds a confession to be voluntary, it

> shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. [18 U.S.C. 3501(a).]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1976.

DOJ-1976-05